INTERIOR BOARD OF INDIAN APPEALS

Jack and Shirley Baker v. Muskogee Area Director, Bureau of Indian Affairs

19 IBIA 164 (01/25/1991)

Also published at 98 Interior Decisions 5

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20 IBIA 164

Reconsideration denied, 20 IBIA 237

39 IBIA 267

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JACK AND SHIRLEY BAKER

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-121-A Decided January 25, 1991

Appeal from a decision declining to take land in trust.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Trust Acquisitions

   The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Blood Quantum--Indians: Lands: Trust Acquisitions

   Land may be acquired in trust status under the Indian Reorganization Act, 25 U.S.C. § 465 (1988), or the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 (1988), for members of the Five Civilized Tribes who possess less than 1/2 Indian blood.

APPEARANCES: Jack and Shirley Baker, pro sese.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Jack and Shirley Baker seek review of a June 4, 1990, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to take land in trust for appellants' benefit. For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further consideration.

Background

Appellants, who are husband and wife, are both registered members of the Cherokee Nation of Oklahoma. Jack Baker possesses 1/64 degree Cherokee blood; Shirley Baker possesses 5/16 degree Cherokee blood. On December 20, 1989, they submitted an application for the trust acquisition of two parcels of land, one containing 0.785 acre and the other 2.39 acres, both located in the S½ SE¼, sec. 15, T. 20 N., R. 13 E., Indian Meridian, Tulsa County, Oklahoma. Appellants stated in their application that they intended to use the property for a smoke shop. They apparently submitted the application to an employee of the Cherokee Nation, who appears to have conducted a preliminary review under 25 CFR Part 151. 1/

By letter of March 6, 1990, the Principal Chief of the Cherokee Nation recommended that the application be denied because neither appellant possessed 1/2 or more Indian blood and because the property was to be used for a smoke shop.

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1/ The Board assumes that the Cherokee Nation performs BIA realty functions under a P.L. 93-638 contract.

By letter of March 26, 1990, the Superintendent, Tahlequah Agency, BIA, denied appellants' request, giving as reasons:

> - There is no statutory authority or policy which would justify your Land Acquisition.
>
> - The purposes for establishing a smoke shop operation are neither unique nor will they contribute significantly to any particular economic or social program of the Tribe.
>
> - You do not own any trust or restricted property currently and therefore it is not known to what degree you would need assistance in handling your affairs.

Appellants appealed to the Area Director, who affirmed the denial on June 4, 1990, stating:

> [25 CFR] 151.10 sets out several factors to be considered when the Secretary evaluates a trust acquisition application, the first of which requires statutory authority for the acquisition. Your appeal document cites the Act of June 18, 1934 (48 Stat. 984), as authority for acquiring land in trust. It is the opinion of this office, however, that there is no authority through which members of the Five Civilized Tribes of Oklahoma [2/] of less than 1/2 degree blood can acquire land in trust. This is based on a review of previous acts relating to the Five Civilized Tribes of Oklahoma, specifically the Acts of May 27, 1908 (35 Stat. 312); January 27, 1933 (47 Stat. 777); February 11, 1936 (49 Stat. 1135); and August 4, 1947 (61 Stat. 732); and the general scheme followed by Congress in dealing with the Five Civilized Tribes of Oklahoma.
>
> In addition to this, our evaluation of your application in accordance with 25 CFR 151.10 supports the findings of the Superintendent that neither the purpose of nor your need for the land in trust justifies the transfer. You have also not demonstrated a need for federal protection and services, other than to operate a business free from state and local jurisdiction.

(June 4, 1990, Decision at 2).

2/ These are the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Tribes.

Appellants' notice of appeal from this decision was received by the Board on July 2, 1990. Only appellants filed a statement with the Board.

Discussion and Conclusions

Appellants contend that the statutes relevant to their acquisition request are the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-479 (1988), 3/ and the Oklahoma Indian Welfare Act of 1936 (OIWA), 25 U.S.C. §§ 501-509, neither of which restricts eligibility for trust land acquisitions to Indians of 1/2 or more Indian blood.

Appellants also argue that they need to have the property taken in trust in order to support themselves with a smoke shop business. They evidently believe that, if their land were in trust status, cigarette sales would not be subject to either state or tribal taxes. 4/ They contend that the trust acquisition will promote economic development because it will provide opportunities for employment.

Appellants further contend they have been discriminated against because trust acquisitions have been made for others. Finally, appellants state that, if the trust acquisition cannot be made for them, they are willing to convey the property either to the United Keetoowah Band of Cherokee Indians or to Shirley Baker's mother, Violet Sanders Hull, who is

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3/ All further references to the United States Code are to the 1988 edition.

4/ Appellants premise this belief upon the decision of the United States Court of Appeals for the Tenth Circuit in Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Commission, 888 F.2d 1303 (10th Cir. 1989), cert. granted, 59 U.S.L.W. 3243 (U.S. Oct. 1, 1990) (No. 89-1322).

5/8 Cherokee. They therefore ask the Board to rule that the trust acquisition can be made for the Band or Ms. Hull.

[1] In several recent decisions, the Board has discussed its role in reviewing BIA decisions concerning the acquisition of land in trust status. See, e.g., Ross v. Acting Muskogee Area Director, 18 IBIA 31 (1989); Eades v. Muskogee Area Director, 17 IBIA 198 (1989); City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989). In City of Eagle Butte, the Board observed that such decisions are committed to BIA's discretion and that the Board does not have jurisdiction to substitute its judgment for BIA's. Cf. State of Florida v. United States Department of the Interior, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). The Board concluded, however, that it does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority. 17 IBIA at 195-96, 96 I.D. at 330, and cases cited therein. The Board has also held that it has jurisdiction to review a discretionary BIA decision to the extent it reaches a legal conclusion. See, e.g., Honaghaahnii Marketing & Public Relations v. Navajo Area Director, 18 IBIA 144, 148 (1990); Simmons v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 243, 247 (1986).

25 CFR 151.10 requires BIA to consider a number of factors in evaluating trust acquisition requests:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

[2] In this case, the Area Director denied appellants' request on the ground, inter alia, that there was no statutory authority for the acquisition. This is a legal conclusion subject to Board review.

The Area Director based his conclusion in this regard upon a series of statutes concerning property of members of the Five Civilized Tribes, enacted subsequent to allotment of tribal lands under various statutes and agreements.

Section 1 of the Act of May 27, 1908, 35 Stat. 312, provided:

> That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions.

Succeeding enactments specifically relating to the restricted lands of members of the Five civilized Tribes with 1/2 or more Indian blood, continued to recognize lands owned by members with less than 1/2 Indian blood as free of restrictions. E.g., Act of May 10, 1928, 45 Stat. 495; Act of January 27, 1933, 47 Stat. 777; Act of February 11, 1936, 49 Stat. 1135; Act of August 4, 1947, 61 Stat 731.

The Area Director concluded that to acquire land in trust status for members of the Five Civilized Tribes with less than 1/2 Indian blood would be contrary to the intent expressed in this series of statutes. His conclusion is supported by two Field Solicitor's memoranda included in the record for this appeal, both of which held that trust acquisitions for such individuals are precluded by these statutes. An August 10, 1976, memorandum from the Muskogee Field Solicitor concluded that, in enacting the OIWA, Congress did not intend to change existing law concerning the Five Civilized Tribes and that, therefore, trust acquisitions for members of less than 1/2 Indian blood could not be made under section 1 of the OIWA, 25 U.S.C. § 501. 5/ A May 19, 1988, memorandum from the Pawhuska Field Solicitor

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5/ 25 U.S.C. § 501 provides:

"The Secretary of the Interior is hereby authorized is his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: Provided, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross production tax * * *."

concluded that, because of the provisions of the 1908 and 1947 Acts, section 210 of the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2209, 6/ was not applicable to members with less than 1/2 Indian blood.

Neither memorandum addresses what is perhaps the broadest trust acquisition authority of all, section 5 of the IRA, 25 U.S.C. § 465. That section provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> * * * * * *
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> Title to any land or rights acquired pursuant to [the IRA] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

This provision is applicable to the Five Civilized Tribes. Although some sections of the IRA were made inapplicable to Oklahoma tribes, section 465 was not one of those sections. 7/ 25 CFR 151.5 recognizes the applicability of section 465 to Oklahoma tribes and their members:

6/ 25 U.S.C. § 2209 provides: "Title to any land acquired under [the ILCA] by any Indian or Indian tribe shall be taken in trust by the United States for that Indian or Indian tribe."

7/ 25 U.S.C. § 473, section 13 of the IRA, provides:
"[S]ections 2, 4, 7, 16, 17, and 18 of this Act [25 U.S.C. §§ 462, 464, 467, 476, 477, 478] shall not apply to the following named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw,

> In addition to acquisitions for tribes which did not reject the provisions of the Indian Reorganization Act and their members, land may be acquired in trust status for an individual Indian or a tribe in the State of Oklahoma under Section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465), if such acquisition comes within the terms of this part. This authority is in addition to all other statutory authority for such an acquisition.

Even though section 465 is applicable to the Five Civilized Tribes, however, the question remains whether it, or any other trust acquisition authority, is applicable to members of those tribes with less than 1/2 Indian blood.

The Board first considers whether the IRA or the OIWA may have repealed the provisions of the statutes concerning the Five Civilized Tribes which removed restrictions from members with less than 1/2 Indian blood. Under normal rules of statutory interpretation, there is a strong presumption against the repeal by implication of a specific statute by a general one. E.g., Morton v. Mancari , 417 U.S. 535, 550-51 (1974). In this case, a further impediment to a finding of repeal is the 1947 Act, enacted several years after the IRA and the OIWA, which clearly appears to be a reaffirmation of Congress' original intent concerning property of members of the Five Civilized Tribes.

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fn. 7 (continued)
Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole."

25 U.S.C. § 478, one of the sections made inapplicable to Oklahoma tribes, authorized tribal elections for the purpose of accepting or rejecting the IRA. The section provided that the Act would not apply to tribes which voted to reject it. The Oklahoma tribes had no opportunity to reject the Act.

However, as was stated by the Supreme Court in Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985):

> [T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. * * * "[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." * * * [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. [Citations omitted.]

Relying in part on Blackfeet Tribe, a Federal court of appeals has recently held that the OIWA repealed the Curtis Act of June 28, 1898, 30 Stat. 495, which had, among other things, abolished the tribal courts of the Creek Tribe. Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). Thus, the court held that a statute of more general application repealed a statute applicable only to the Five Civilized Tribes.

In light of the 1947 statute, the Board is unable to conclude that a similar repeal occurred in this case. The 1947 Act removed any ambiguity that might have existed concerning whether either the IRA or the OIWA was intended to repeal the earlier statutes relating to the property of members of the Five Civilized Tribes. The legislative history of the 1947 Act makes it apparent, however, that the Act was not intended to apply to lands acquired in trust under the OIWA. The House report on the bill which became the 1947 Act explained:

> The main purpose of the bill is to clarify the laws relating to the approval of conveyances of restricted Indian lands

> [of the Five Civilized Tribes], definitely defining the jurisdiction of the Oklahoma State courts over certain classes of Indian litigation, the procedure governing the removal of cases to the Federal courts, and the limitation of the tax-exempt acreage of restricted Indian lands.
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> * * * * * *
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> * * * The tax-exempt status of lands now held or hereafter acquired in the name of the United States in trust for Indians and Indian tribes under the provision[s] of the Oklahoma Welfare Act of June 26, 1936 (49 Stat. 1967) would not be affected by the provisions of this bill.

H.R. Rep. No. 740, 80th Cong., 1st Sess. 4 (1947). See also id. at 5 (comments of the Under Secretary of the Interior); S. Rep. No. 543, 80th Cong., 1st Sess. 4, 5 (1947). From this report language, it is apparent that Congress both recognized the OIWA as applicable to the Five Civilized Tribes and intended the OIWA land acquisition provision to remain separate from the provisions of the statutes concerning the Five Civilized Tribes.

Accordingly, the Supreme Court's analysis in Blackfeet Tribe, supra, is particularly relevant to this matter. That case involved the relation between certain statutes governing mineral leasing of tribal lands. The Act of February 28, 1891, 25 U.S.C. § 397, authorized leasing. The Act of May 29, 1924, 25 U.S.C. § 398, authorized state taxation of mineral production from leases under the 1891 Act. In 1938, Congress enacted the comprehensive Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396f. In Blackfeet Tribe, the Court held that the taxing authorization in the 1924 Act was not incorporated into the 1938 Act and so was inapplicable to mineral production from leases entered into under the later Act. The Court did not hold specifically that the taxing authorization had been repealed

by the 1938 Act but stated that, if it survived at all, it was applicable only to leases entered into under the 1891 and 1924 Acts. 471 U.S. at 768. In reaching its conclusion, the Court relied in part upon the canon of construction noted above, i.e., that ambiguous statutory provisions are to be interpreted to the Indians' benefit. 8/

This case concerns the relation between the statutes concerning the Five Civilized Tribes on the one hand and the IRA and the OIWA on the other hand. It presents the specific question whether the land ownership limitations placed upon tribal members of less than 1/2 Indian blood by the first-named group of statutes are incorporated into the land acquisition provisions of the IRA and the OIWA. The answer to this question depends, at least in part, on the meaning of the term "restricted" as used in reference to land in the statutes concerning the Five Civilized Tribes.

Unlike Indians allotted under the General Allotment Act of 1887, 24 Stat. 388, who received their allotments in trust status, members of the Five Civilized Tribes were allotted under special statutes and agreements and received their allotments in “restricted fee” status. 9/

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8/ The Court also invoked another principle of statutory construction in Indian law: “[T]he States may tax Indians only when Congress has manifested clearly its consent to such taxation.” 471 U.S. at 766.

9/ The difference between these two types of allotments is explained in Cohen's Handbook of Federal Indian Law (1982 edition) at 615-16:

> “[A]llotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian (‘trust’ allotment), or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials (‘restricted fee’ allotment). * * * Historical differences in terminology and statutory origin cause occasional disputes over these definitions.”

(Footnotes omitted).

In many Federal statutes, the term "restricted," when applied to individually owned Indian land, refers only to lands held in restricted fee status. In these statutes, the terms "trust" and "restricted" (or "subject to restrictions against alienation") are both used, and it is apparent that the term "restricted" is not intended to encompass land held in trust status. Examples include: 25 U.S.C. §§ 323 (rights-of-way); 416, 416c (leases on San Xavier and Salt River Reservations); 483a (mortgages); 2201(4) and other provisions throughout the ILCA. 10/ Other statutes, however, use the term "restricted" to mean any land with restraints on alienation, including land held in trust status. Examples include: 25 U.S.C. §§ 380 (lease of allotments of deceased Indians); 393 (farming and grazing leases); 415 (general leasing). Some statutes, e.g., 25 U.S.C. § 406 (timber sales), appear to use the term in both senses (compare 406(a), (b), and (e) with 406(c) and (f)). It is apparent that Congress has used the term "restricted" in two different senses, and thus an ambiguity may be said to exist with respect to its intended meaning in the statutes concerning the Five Civilized Tribes.

The Area Director, and the Field Solicitors' memoranda on which he relied, employ the broader meaning of the term "restricted" in construing

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fn. 9 (continued)

For many purposes, trust and restricted allotments have been treated alike. See, e.g., United States v. Ramsey, 271 U.S. 467 (1926) (criminal jurisdiction); West v. Oklahoma Tax Comm'n, 334 U.S. 717, 723-27 (1948) (state taxes); 43 CFR 4.201(m) (probate). See, generally, Cohen at 615-18.

10/ 25 U.S.C. § 2201(4) defines the term "trust or restricted lands" for purposes of the ILCA as "lands, title to which is held by the United States in trust for an Indian or an Indian tribe or lands title to which is held by Indians or an Indian tribe subject to a restriction by the United States against alienation."

those statutes. Thus they conclude that the acquisition of land in trust status is impermissible for tribal members who cannot hold restricted lands under those statutes. This is a reasonable construction of the statutes.

It would also be reasonable, however, to construe the term "restricted" in the statutes concerning the Five Civilized Tribes in the narrower sense of "restricted fee," because that was the status in which allotments had been made to the members of the Five Civilized Tribes and thus was presumably the status Congress had in mind when enacting further statutes concerning those allotments. This conclusion is supported by the House and Senate reports on the 1947 Act, which appear to recognize a distinction between restricted and trust lands; they use the term "restricted" throughout, in reference to lands held under the statutes concerning the Five Civilized Tribes, but change terminology when they refer to lands held under the OIWA, speaking there of lands held or acquired in "trust."

Under the narrower construction of the term "restricted," members of the Five Civilized Tribes with less than 1/2 Indian blood, although ineligible to hold or inherit land in restricted fee status, would be eligible to have land acquired in trust for them, assuming they meet other eligibility requirements. Under the canon of construction discussed above, the second construction, which is to the Indians' benefit, is to be preferred. Cf. Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1569 (10th Cir. 1984), dissenting opinion adopted as majority opinion by the court en banc, 782 F.2d 855 (10th Cir. 1986), cert. denied, 479 U.S. 970 (1986)

("Given two reasonable interpretations [of a regulation concerning oil and gas royalties], Interior's trust responsibilities require it to apply whichever accounting method * * * yields the Tribe the greatest royalties").

This construction is also more consistent with the view of the court of appeals in Muscogee (Creek) Nation concerning the intent of Congress in the OIWA that "all of the Oklahoma tribes were to have the same legal status." 851 F.2d at 1445. 11/ The court noted that "[a]n interpretation of the OIWA that permitted some Oklahoma tribes to have courts but not others would not comport with that intent." Id. Likewise, an interpretation that imposed upon some tribes but not others a two-class system of membership would not comport with such an intent. In this regard, the Board notes that the legislative history of the OIWA, as discussed in the Muskogee Field Solicitor's 1976 memorandum, indicates that the original bill did in fact divide Oklahoma Indians into two classes, based on blood quantum. That provision was deleted, as was another provision which would have defined "tribe" as an entity consisting only of persons with 1/2 or more Indian blood. 12/ As enacted, the OIWA contains no references to blood quantum.

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11/ In other respects as well, the courts have shown a recent tendency to apply to the Five Civilized Tribes general principles of Indian law previously considered inapplicable to them. See, e.g., Housing Authority of the Seminole Tribe v. Harjo, 790 P.2d 1098 (Okla. 1990), in which the Oklahoma Supreme Court held that certain formerly restricted land was Indian country for purposes of criminal and civil jurisdiction.

12/ The Field Solicitor stated that S. 2047, 74th Cong., 1st Sess., as introduced on Feb. 26, 1935, included the following provision:

"[5](a) The term 'Indian of the first degree' shall mean any person whose name appears on the membership rolls of such tribe heretofore or

As discussed above, 25 U.S.C. § 465, derived from the IRA, is applicable to the Five Civilized Tribes. The definition of "Indian" for purposes of the IRA appears at 25 U.S.C. § 479, is applicable to the Five Civilized Tribes, and provides that "'[t]he term 'Indian' * * *shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." The OIWA does not define "Indian" but incorporates, for some purposes at least, the definition at 25 U.S.C. § 479. See 25 U.S.C. § 504.

Appellants come within the IRA definition because they are members of a recognized Indian tribe under Federal jurisdiction. The Board concludes that land may be taken in trust for them under either the IRA or the OIWA.

Even though legal authority for this trust acquisition exists, however, appellants are not entitled to have the property taken in trust for them. As discussed above, the decision whether to acquire land in trust status

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fn. 12 (continued)
hereafter approved by the Secretary of the Interior, and who is classified by the Secretary of the Interior as a person having one-half or more of Indian blood;

"(b) The term 'Indian of the second degree' shall mean any person whose name is now on or may hereafter be placed on the official rolls of the Indian office in Oklahoma and who is classified by the Secretary of the Interior as a person having less than one-half of Indian blood."

The Field Solicitor also indicated that the original bill provided for the taking into trust of the restricted fee lands of Five Civilized Tribes members of the "first degree" and for removal of restrictions from all Oklahoma Indians of the "second degree."

under the IRA or the OIWA is committed to the discretion of BIA. The Board will not disturb a BIA decision which is properly based on BIA's consideration of the criteria in 25 CFR 151.10.

In this case, the Area Director's decision, based in part on a legal conclusion, also gave other reasons for denying appellants' request. It is possible, however, that the Area Director's view of the law may have colored his further consideration of the request. The Board finds therefore that this matter should be remanded to enable the Area Director to consider appellants' request in light of the legal conclusion reached in this decision.

The Board touches briefly on the legal issues raised in some of appellants' other arguments.

Appellants contend that they have been discriminated against because other Indians have had land taken in trust for them. The Board addressed a similar argument in Eades, 17 IBIA at 202:

> Appellant also argues that she has been discriminated against because other Creeks have had land taken into trust for their benefit. Because no applicant has a right to have lands taken into trust for his or her benefit, and because BIA must consider each trust acquisition application on its own merits, an allegation that other Indians have had land taken into trust is insufficient to show that discrimination has occurred.

Like the appellant in Eades, appellants here do no more than allege that others have had land taken into trust. Such an allegation is insufficient to show discrimination.

Appellants also request the Board to issue an advisory opinion concerning whether a trust acquisition could be made for either the United Keetoowah Band of Cherokee Indians or Violet Sanders Hull, if appellants were to convey their property to the Band or Ms. Hull. The Board has no authority to issue an opinion on either question, absent an Area Director's decision concerning the matter. 43 CFR 4.1(2); 4.330(a); 4.331; Florida Tribe of Eastern Creek Indians v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 269 (1985).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Muskogee Area Director's June 4, 1990, decision is vacated and this matter is remanded to him for further consideration in accordance with this opinion.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge